



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

December 1, 2014
PR 14-31

Ms. Cynthia Boss

RE: Boss v. Woonsocket Superintendant's Office

Dear Ms. Boss:

The investigation into your Access to Public Records Act ("APRA") complaint filed against the Woonsocket Superintendant's Office ("Superintendent's Office") is complete. It appears that, on November 23, 2013, you filed an APRA request with the Superintendent's Office seeking, among other documents, a copy of the Superintendent's evaluation "that had been voted on and approved at the November 13, 2013 Woonsocket School Committee Closed Session meeting." On December 5, 2013, the Superintendent's Office, through a letter written by the Superintendent, denied your request for the Superintendent's evaluation indicating that "[t]he evaluation you requested is not a public document for several reasons, including the fact that it was never accepted by the School Committee and, therefore was a working paper only, nor was it introduced at a public meeting." See R.I. Gen. Laws § 38-2-2(4)(K).¹ It is significant that the December 5, 2013 correspondence was written by the Superintendent and did not cite any other reasons for the denial.

Subsequently, on December 11, 2013 you sent, what you term, a "follow up" correspondence to the Superintendent's Office expressing your disagreement with the December 5, 2013 denial and stated, "[p]lease be advised that if I have not received a copy of this duly voted-on and approved 'Superintendent's evaluation' document by 3:00 pm on Friday December 13, 2013, I will file an immediate APRA complaint with the Rhode Island Attorney General's Office ***."² In

¹Rhode Island General Laws § 38-2-2(4)(K) exempts from disclosure "[p]reliminary drafts, notes, impressions, memoranda, working papers, and work products; provided however, any documents submitted at a public meeting of a public body shall be deemed public."

² It is unclear whether your "follow up" correspondence on December 11, 2013 was a new APRA request. The contents of the letter, and the fact that you term it a "follow up," suggests

response, on December 13, 2013, the Superintendent's Office, through a letter written by the Superintendent, once again denied you access to the evaluation under the "working paper" exemption, but the December 13, 2013 correspondence also exempted the evaluation under R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), which exempts documents from being disclosed if disclosure "would constitute a clearly unwarranted invasion of personal privacy." It is significant that the December 13, 2013 correspondence was the first time that the Superintendent's Office raised the privacy exemption set forth in R.I. Gen. Laws § 38-2-2(4)(A)(I)(b).

As a result of the foregoing, you filed the instant APRA complaint. Despite the more or less specific nature of your APRA complaint, it appears you believe the Superintendent's Office violated the APRA when it improperly denied you access to the Superintendent's evaluation in its December 5, 2013 letter. You also argue that, pursuant to R.I. Gen. Laws § 38-2-7(a), the Superintendent's Office should not be permitted to withhold the evaluation under R.I. Gen. Laws § 38-2-2(4)(A)(I)(b), as asserted in its December 13, 2013 letter, because the Superintendent's Office failed to raise this exemption in the December 5, 2013 denial letter.

At the outset, we note that in examining whether a violation of the APRA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Superintendent's Office violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

The Superintendent's Office argues that the December 5, 2013 letter denied your request for a copy of the Superintendent's evaluation under R.I. Gen. Laws § 38-2-2(4)(K) and "alluded to" the personal privacy exemption. The December 5, 2013 denial letter states, in relevant part:

"The evaluation you requested is not a public document for several reasons, including the fact that it was never accepted by the School Committee and, therefore, was a working paper only, nor was it introduced at a public meeting. Accordingly, it is not a public document."

In response to your complaint, the Superintendent's affidavit argues (and acknowledges) that:

that it was not a new APRA request. For instance, in relevant part you state, "I am writing to inform you that I disagree with your failure to provide all of the documents I have requested. *** Please be advised that if I have not received a copy of this duly voted-on and approved 'Superintendent's evaluation' document by 3:00 pm on Friday December 13, 2013, I will file an immediate APRA complaint with the Rhode Island Attorney General's Office***." In any event, since you made your initial APRA request by letter dated November 23, 2013, which was denied by letter dated December 5, 2013, your December 11, 2013 correspondence – no matter what it is called – is superfluous.

"[The] December 5 denial of access was incomplete. I wrongly thought that the evaluation had not been considered by the school committee***. Since minutes of the November 13, 2013 meeting are available and were sent to the complainant, there can be no explanation for my ostensibly denying that the evaluation had been accepted by the committee, other than as an unintentional and honest mistake.

However, in my December 5 denial of access I alluded to, without delineating, every reason to support a denial of access. I said that my evaluation was not a public document "for several reasons," but because I was under the mistaken apprehension that the evaluation had not been considered by the committee, I specified that the evaluation was only a "working paper" which had never been accepted. Thus, I alluded to, without specifying, the more substantive reason for denial: that access would clearly constitute an unwarranted invasion of my personal privacy.

Therefore, because the substantive reason for denying access was included in my timely December 13 response; because of the multiple requests submitted for the evaluation, concluding with the complainant's final demand of December 11, 2013; and because the public generally, and superintendents specifically, would greatly benefit by a resolution of the uncertainty raised by this request for access to my written evaluation, I respectfully suggest that there is sufficient 'good cause shown' (see 38-2-7(a)) to consider the issue on its merits."³

We begin by addressing whether the Superintendent's December 5, 2013 denial letter "specifically" set forth the personal privacy exemption. The APRA requires that "any denial of the right to inspect or copy records...shall be made to the person or entity requesting the right in writing giving the specific reasons for the denial..." R.I. Gen. Laws § 38-2-7(a). (Emphasis added). While the Superintendent's Office argues that the December 5, 2013 denial letter "alluded to, without specifying, the more substantive reason for denial: that access would clearly constitute an unwarranted invasion of my personal privacy," respectfully we must reject this argument. (Emphasis added).

Frankly, we have little trouble concluding that only one (1) reason was cited in the December 5, 2013 denial letter, *i.e.*, the working papers exemption. The APRA requires that public bodies provide "specific reasons" for denying requests and even the Superintendent's affidavit acknowledges this level of specificity (for the privacy exemption codified at R.I. Gen. Laws § 38-2-2(4)(A)(I)(b)) was not satisfied. Respectfully, the phrase "is not a public document for several reasons" could signify any one of the APRA's twenty-seven (27) exemptions and is, therefore, not sufficient to comply with the requirements of R.I. Gen. Laws § 38-2-7(a). For

³ In relevant part, the APRA exempts from disclosure "[p]ersonnel and other personal individually-identifiable records...the disclosure of which would constitute a clearly unwarranted invasion of personal privacy pursuant to 5 U.S.C. 552 et. seq. ***." R.I. Gen. Laws § 38-2-2(4)(A)(I)(b).

example, in Nye v. Town of Westerly, PR 95-21, we held that a statement that the information sought “is not public information” was not sufficient to comply with the APRA’s mandate. Years later, in Constantino v. Smithfield School Committee, PR 13-24, we found that the School Committee’s response that, “[p]ursuant to Rhode Island General Laws, the minutes of a closed session, in this circumstance, are not public records” violated the APRA because its reason for denial was not sufficiently specific. Thus, we conclude that the personal privacy exemption was not “specifically” set forth in the December 5, 2013 denial letter and that your request for a copy of the evaluation was denied only on the grounds that it was a “working paper,” *i.e.*, pursuant to R.I. Gen. Laws § 38-2-2(4)(K). As noted *infra*, even the Superintendent now acknowledges that the evaluation is not exempt pursuant to R.I. Gen. Laws § 38-2-2(4)(K).

Having reached the above conclusion, the only issue left to be decided is whether there is “good cause” to permit the Superintendent’s Office to withhold disclosing the evaluation even though not expressly claimed in the December 5, 2013 denial. Under R.I. Gen. Laws § 38-2-7(a):

“[a]ny denial of the right to inspect or copy records, in whole or in part provided for under this chapter shall be made to the person or entity requesting the right in writing giving the specific reasons for the denial within ten (10) business days of the request and indicating the procedures for appealing the denial. Except for good cause shown, any reason not specifically set forth in the denial shall be deemed waived by the public body.” (Emphases added).

This issue was recently addressed by this Department in Scripps News v. Rhode Island Department of Business Regulation, PR 14-07. In Scripps, the Rhode Island Department of Business Regulations (“DBR”) violated the APRA when it failed to respond to Complainant’s APRA request within ten (10) business days. Since DBR failed to respond within the time required under the APRA, the lack of response was deemed a denial and this Department was left to decide whether there was “good cause” to allow DBR to withhold certain documents under an exemption that had not been timely asserted. We concluded that sufficient “good cause” was shown to overcome a waiver argument because the documents in question were required to remain confidential under R.I. Gen. Laws § 38-2-2(4)(S), which exempts from disclosure “[r]ecords, reports, opinions, information, and statements required to be kept confidential by federal law or regulation or state law, or rule of court.” Specifically, R.I. Gen. Laws § 27-13.1-5(f)(1)(i) explicitly prohibited the documents from being disclosed.

Here, unlike the documents in Scripps, we have been provided with no evidence or argument that the Superintendent’s evaluation is required to be kept confidential by “federal law or regulation or state law, or rule of court.” We have also been provided little else to support a finding of “good cause.” Indeed, other than a general argument of “good cause,” the Superintendent’s Office falls short of explaining why the waiver provision detailed in R.I. Gen. Laws § 38-2-7(a) should not be enforced.⁴ This omission is especially significant in light of the fact that the Superintendent herself denied your request for a copy of her own evaluation.

⁴ While the Superintendent’s Office argues at length about the unreliability of the evaluation, specifically stating that “the evaluation in question is not a reliable instrument which will fairly

Although the Superintendent's Office places an emphasis on the fact that all subsequent APRA requests for the evaluation were denied on the grounds that disclosure would "constitute an unwarranted invasion of personal privacy," in our opinion, this fact does nothing to aid the Superintendent's Office. As discussed above, there is no doubt that the Superintendent Office's December 5, 2013 denial did not specifically reference the personal privacy exemption and the Superintendent Office's argument only highlights the fact that the Superintendent's Office could, and should, have also specifically stated R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) as a reason for denying your request. Indeed, in the Superintendent's affidavit the Superintendent affirms that she "[has] always believed that [evaluations] were personnel records and, as customary in Rhode Island, were never deemed public." See Superintendent's Affidavit ¶ 4. Faced with the situation where the Superintendent indicates that she "always believed" that evaluations were exempt, yet clearly did not specifically reference the personal privacy exemption as required by R.I. Gen. Laws § 38-2-7(a), it is difficult for us to conclude that "good cause" has been demonstrated in this situation.

While the Superintendent claims that it was an "unintentional and honest mistake" – an assertion we have no reason to doubt – we are not convinced that this situation was contemplated by the General Assembly when they carved the "good cause" exception into R.I. Gen. Laws § 38-2-7(a). The specific requirement of "good cause" would be meaningless if the public body could establish "good cause" simply by showing that the failure to state the reasons for the denial, as required by the APRA, was an "unintentional and honest mistake." More importantly, if we were to find "good cause" under these circumstances, it would do nothing to encourage compliance with the APRA, and such a result certainly would be contrary to the APRA's purpose, plain language, and construction.

Therefore, based on the totality of the circumstances, we find that the Superintendent's Office has not shown sufficient "good cause," as required under R.I. Gen. Laws § 38-2-7(a), to overcome a waiver argument. In so concluding, we find the Superintendent's Office has waived its right to deny your request under R.I. Gen. Laws § 38-2-2(4)(A)(I)(b). Finally, based on the evidence presented – namely the fact that the Superintendent's Office admits that the evaluation is not a "working paper" because the evaluation was approved at the School Committee's November 13, 2013 meeting – we find that the Superintendent's Office violated the APRA when it denied your request for the evaluation under R.I. Gen. Laws § 38-2-2(4)(K).⁵

serve a public purpose," respectfully, we fail to see how this argument, even if we were to accept it, is relevant in these circumstances.

⁵ In paragraph 7 of the Superintendent's affidavit, the Superintendent states, in pertinent part:

"I wrongly thought that the evaluation had not been considered by the school committee at both the November 6 meeting (at which it in fact was not considered) and the November 13 meeting (at which in fact it was considered). Since the minutes of the November 13, 2013 meeting are available and sent to the complainant, there can be no explanation for my ostensibly denying that the

Upon a finding of an APRA violation, the Attorney General may file a complaint in Superior Court on behalf of the Complainant, requesting "injunctive or declaratory relief." See R.I. Gen. Laws § 38-2-8(b). A court "shall impose a civil fine not exceeding two thousand dollars (\$2,000) against a public body...found to have committed a knowing and willful violation of this chapter, and a civil fine not to exceed one thousand dollars (\$1,000) against a public body found to have recklessly violated this chapter***." See R.I. Gen. Laws § 38-2-9(d). Here, we conclude that insufficient evidence exists at this time to find a "knowing and willful" or "reckless" violation. Notwithstanding, we direct the Superintendent's Office to provide you with a copy of the Superintendent's evaluation within ten (10) business days of this finding. If you do not receive the evaluation within ten (10) business days, kindly advise this Department so that we may review this matter further to ensure compliance with the APRA.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Malena Lopez Mora', written in a cursive style.

Malena Lopez Mora
Special Assistant Attorney General
Ext. 2307

Cc: Benjamin M. Scungio, Esquire

evaluation had been accepted by the committee, other than as an unintentional and honest mistake."